FILED
MAY 27 1992
OFFICE OF THE CLERK

No. 91-1560

In the Supreme Court of the United States

OCTOBER TERM, 1991

ARNOLD HOCHSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on November 15, 1991 (App., *infra*, 5a).[1] No petition for rehearing was filed (App., *infra*, 5a). The time provided by 28 U.S.C. 2101(c) for filing a petition for a writ of certiorari thus expired on February 13, 1992. See Rule 13.1 of the Rules of this Court. The petition was not filed until March 18, 1992, and is therefore out of time. The time limit provided in 28 U.S.C. 2101(c) is jurisdictional. *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 207 (1952); *Department of Banking* v. *Pink*, 317 U.S. 264, 268 (1942). The Court thus lacks jurisdiction to consider the petition.

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[1] "App." references are to the appendix attached to this memorandum.

The mandate of the court of appeals was issued on December 10, 1991 (App., *infra*, 5a). Two days later, on December 12, 1991, the clerk noted on the district court docket sheet the filing of a "true copy of mandate and order w/statement of costs that the judgment of the district court is affirmed" (App., *infra*, 11a). Petitioner has provided us with a copy of the November 15, 1991, order of the court of appeals affirming the judgment of the district court on which there is the stamped notation "THIS DOCUMENT WAS ENTERED ON THE DOCKET ON" followed by a handwritten date that appears to be "12-12-91" (App., *infra*, 16a). This notation evidently was made by the district court clerk, for the date of the notation corresponds with the date that the clerk filed the mandate of the court of appeals in the district court docket (App., *infra*, 11a).

Petitioner apparently read the handwritten date on the district court's copy of the court of appeals' order as being "12-19-91" (see Pet. 9). That date, however, does not correspond to any entry on the docket sheet of the district court (App., *infra*, 6a-11a) or the court of appeals (App., *infra*, 1a-5a). But, even if the handwritten date on the district court's copy of the court of appeals' order was December 19, 1991, the petition is untimely. Under Rule 36 of the Federal Rules of Appellate Procedure, the notation of the judgment in the court of appeals' docket constitutes entry of the judgment. The docket sheet *of the court of appeals* contains the notation, dated November 15, 1991, "Judgment AFFIRMED by detailed order of the court without opinion filed. (Per: JON) (onl)" (App., *infra*, 5a). The notation on November 15, 1991, constitutes the entry of the judg-

ment of the court of appeals under Fed. R. App. P. 36.[2] The notation entered on the district court's *copy* of the order of the court of appeals has no bearing in determining the timeliness of the petition.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

MAY 1992

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[2] If the docket sheet notation entered on December 10, 1991 —"Judgment MANDATE ISSUED. (une)" (App., *infra*, 5a)—represents entry of the court's judgment, the petition in this case is still untimely, for the petition was not filed until March 18, 1992.

APPENDIX

GENERAL DOCKET FOR
Second Circuit Court of Appeals

Court of Appeals Docket #: 91-6164 Filed: 6/25/91
Nsuit: 2870 STATUTES-Tax Suits
Hochstein v. USA
Appeal from: U.S. District Court SDNY

Case type information:

1) Civil
2) USA as party
3) none

Lower court information:

District: 0208-01: 87-cv-2094
Trial Judge: Peter K. Leisure
Date Filed: 3/20/87
Date order/judgment: 4/24/91
Date NOA filed: 6/20/91

Fee status: paid

Prior cases:

None

Current cases:

None

Panel Assignment:

Panel: JON RKW JEL 1705 :CA2 11/14/91 am
Date of decision: 11/15/91

Proceedings include all events.
91-6164 Hochstein v. USA

ARNOLD HOCHSTEIN
Plaintiff-Appellant

Stephen R. Sugrue, Esq.
212-980-6488
SS 0614
[COR LD NTC ret]
Coti & Sugrue
575 Lexington Ave.
New York, NY 10022

UNITED STATES OF AMERICA
Defendant-Appellee

Nancy L. Savitt, Esq.
212-385-6256
19th floor
[COR LD NTC ret]
U.S. Attorney's Office
Civil Division, Appellate Unit
Southern District
of New York
100 Church St.
New York, NY 10007

Proceedings include all events.
91-6164 Hochstein v. USA

Official Caption [1]

Docket no. 91-6164

ARNOLD HOCHSTEIN,
Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,
Defendant-Appellee

Authorized Abbreviated Caption [2]

Docket no. 91-6164

HOCHSTEIN V USA

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[1] Fed. R. App. P. Rule 12(a) and 32(a).

[2] For use on correspondence and motions only.

Proceedings include all events.
91-6164 Hochstein v. USA

6/25/91	Prior case:89-6190 (coa)
6/25/91	Copy of district court docket entries and notice of appeal on behalf of Appellant Arnold Hochstein filed. [91-6164] Form C due on 7/1/91. Form D due on 7/1/91. (coa)
6/25/91	Copy of receipt re: payment of docketing fee filed on behalf of Appellant Arnold Hochstein receipt #: 38374. [91-6164] (coa)
7/1/91	Appellant Arnold Hochstein Form C filed with proof of service. [91-6164] Form C deadline satisfied. (coa)
7/1/91	Appellant Arnold Hochstein Form C filed, with proof of service. [91-6164] Form D deadline satisfied. (coa)
7/3/91	Scheduling order #1 filed. Record on appeal due on 7/26/91. Appellant's brief and appendix due on 8/2/91. Appellee's brief due on 9/2/91. Argument as early as week of 9/23/91. (Pre-Argument Conference scheduled for PC:7.17.91/@11:15am). (coa)
7/23/91	New scheduling order number 2 filed. New record on appeal due date is 8/9/91. New appellant's brief due date is 8/16/91. New appellee's brief due date is 9/16/91. New argument week as early as 10/7/91. (onc)
8/23/91	Record on appeal filed. (Original papers of district court.) Number of volumes: 1 (onc)
8/27/91	New scheduling order number 3 filed. New appellant's brief and joint appendix due date is 8/30/91. New appellee's brief due date is 9/30/91. New argument week as early as 10/21/91. (onc)
8/28/91	New scheduling order number 4 filed. New appellant's brief due date is 9/3/91. New appellee's brief due date is 10/1/91. New argument week as early as 10/21/91. (onc)

8/30/91	Notice of appearance form on behalf of Nancy L. Savitt, Esq., received. (Orig. to Calendar) (une)
9/3/91	Appellant Arnold Hochstein brief FILED with proof of service. (one)
9/3/91	Appellant Arnold Hochstein joint appendix filed w/pfs. Number of volumes: 1. (one)
9/19/91	First supplemental record on appeal filed. Volumes: 1. (onc)
9/24/91	Proposed for argument the week of 11/12/91. (cac)
9/30/91	Appellee USA brief filed with proof of service. (onc)
10/1/91	Set for argument on 11/14/91. [91-6164] (cac)
10/16/91	Appellant Arnold Hochstein reply brief filed with proof of service. (onc)
11/14/91	Case heard before LUMBARD, NEWMAN, WINTER, C.JJ. (TAPE: #62-63) (caa)
11/15/91	Judgment AFFIRMED by detailed order of the court without opinion filed. (Per: JON) (onl)
11/20/91	Appellee USA itemized and verified bill of costs received. (onl)
11/22/91	Appellee USA statement of costs taxed in the amount of $100.54 filed. (onl)
12/10/91	Judgment MANDATE ISSUED. (une)
1/24/92	Record on appeal RETURNED to lower court. No. of volumes: 1 (rew)
4/6/92	Notice of filing petition for writ of certiorari for Appellant Arnold Hochstein dated Mar. 18, 1992 filed. Supreme Ct #: 91-1560. (onl)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

87-Civ. 2094

HOCHSTEIN, ARNOLD,
THIRD-PARTY COMPLT.

v.

UNITED STATES OF AMERICA,
THIRD-PARTY PLTF.

DATE	NR.	PROCEEDINGS
2-30-87	1	Fld. Complaint; Issd. Summons & Notice purs. to 28 U.S.C. 636(c). Jur Trial Demanded.
5-1-87	2	Fld. THIRD-PARTY COMPLT. HLW
5-1-87	3	Fld. Deft's ANSWER with Counterclaim. RG HLW
08-06-87	4	Filed USA's notice of taking depositionu of Rosenthal & Rosenthal, Inc. on 8-02-87 dd
08-18-87	5	Filed ANSWER of third-party deft, Gary Eckstein to htird-party complaint of the USA GT&L dd
08-25-87	6	Filed The USA notice of taking deposition of Ernest Eckstein on 9-10-87 dd
9-18-87		PRE-TRIAL CONFERENCE HELD BY J. Leisure 2:00 p.m. HG
10-13-87	7	Fld. Stip. & Order, this dismisses 3rd party action only., with prejudice and with costs of attorney's fees. LEISURE, J. HL
12-4-87		PRE-TRIAL CONFERENCE HELD BY J. Leisure HG

DATE	NR.	PROCEEDINGS
7-13-88	8	Fld. Stip & Order, that the parties' time to comply with the Court's directive wit respect to the submission of a Pre-trial order shall is extended to 8-11-88. SO ORDERED LEISURE, J. HG
8-22-88	9	Fld. STIP that parties time to comply witht he courts directive with respect to the submission of pretrial order is ext to 9-12-88 . . . LEISURE, J. kr
9-21-88	10	Fld. deft's Trial Memorandum. VB
9-20-88	11	Fld. Memo Endosed on letter to Judge Leisure from MARX R. HASTINGS dtd 9-19-88 extending time answer till 9-21-88. So Ordered Leisure, J. CM.
10-17-88	12	Fld. Pltf's Trial Memorandum of Law.
10-17-88	13	Fld. Pre-Trial Order that the court may in order to prevent manifest injustice or good cause shown, at the trial of the action of prior thereto upon application of counsel for any party made in good faith or upon the court's own motion to modify this Pre-Trial Order to the extent that the court may deem such modification to just and proper. So Ordered Leisure, J. CM. VB
4-27-89	14	Fld. defts proposed findings of facts and conclusions of law. VB
4-27-89	15	Fld. Pltfs Proposed findings of facts and conclusions of law. VB
4-28-89	16	Fld. Defts Notice of motion in limline for an order precluding pltf from calling as a witness a representative of the Internal Revenue Service to testify. re 5 received in night deposit box on 4-28-89 at 5:54 PM.

DATE	NR.	PROCEEDINGS
4-28-89	17	Fld. Defts memorandum of law in support of defts motion in limline for an order precluding pltf from eliciting testimony concerning the decision to assess plt a responsible person. received in night deposit box on 4-28-89 at 5:54 pm.
5-8-89	—	non jury trial began 5-8-89 and concluded 5-8-89 for 1 total trial day. Judges d to submit post trial papers by 5-18-89 with a limit Of 3 pages. Court reporter MICHAEL D'AMATO & SANDRA MIASKOFF. submitted by EILEEN CHAN. VB
5-22-89	18	Fld Pltfs Post trial memo. PM
5-26-89	19	Fld. defts supplemental findings of facts and conclusions of law.
5-26-89	20	Fld. defts findings of facts and conclusions of law. Ordered that judgment be for pltf in the sums paid by him under the 6672 assessment w/interest; the Counts
6-12-89	21	Fld. Judgment #89,1412 Ordered that pltf HOCHSTEIN recover from deft U.S.A. the sum of $619.74 w/interest of $176.08 plus costs of the action; Governments assess against pltf un 28 U.S.C. 6672 is vacated; deft and their agencies are enjoined from taking any further steps to recover pltf any employment taxes of pltf s for employer the Safelon Corp; Pltf Arnold hochstein is allowed all writs and pro provided by law for the enforcement of this judgment. Ordered Leisure, J. cm. EOD 6-14-89. VB
6-14-89	—	Mailed court of appeal letter and forms re appeal procedures to S. SUGRUE, P. TILL, and BENITO ROMANO. VB
6-21-89	22	Fld. Pltfs notice of entry of judgment on 6-14-89. VB

DATE	NR.	PROCEEDINGS
6-23-89	23	Fld. pltfs notice of taxation as set forth in the Bill of costs on 6-27-89 at 9:30 a.m. VB
8-4-89	24	Filed Transcripts of record of proceedings, date 5-8-89. VB
8-4-89	25	Filed Transcripts of record of proceedings, date 5-5-89. VB
8-11-89	26	Fld. deft counter-claim pltf's Notice of appeal from the judgment dtd 6-14-89 Mailed copies to interested parties on 8-15-89 VB
8-15-89	—	Forwarded copy of notice to dist. judge and copy of docket to the USCA 2nd cir. VB
9-20-89	267	Fld. notice of original record to the USCA 2nd cir on 9-20-89. VB
5-2-90	268	Fld. True copy ofmandate and order from the USCA 2nd cir Ordered the judgm the dist court is vacated and the action is remanded to the district court further proceedings consistent with the opinion of this court. Elaine Goldsmith EOD 5-4-90. cm. Copy to judge VB
6-15-90	269	Fld. Judgment No. 90,1215 Ordered the cmplt is dismissed and deft have judgment against pltff in the sum of $45,319.29 plus interest in accordance with law from the date of judgment. Ordered Judge Leisure. EOD 6-19-90. cm.
6-29-90	—	Mailed court of appeal letter and forms re appeal procedures to Stephen Sugrue
7-9-90	—	Fld. Order that the effect of the judgment dtd 6-14-90 is stayed pending a judicial determination of the proper judgment amount. . . Ordered judge Leisure cmc

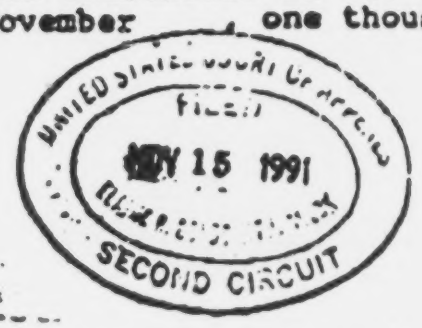
DATE	NR.	PROCEEDINGS
7-12-90	—	Fld. order of reference to a magistrate for the purpose of Inquests and Substantive motions; referred for determination of proper judgment amount; should be treated as a rule 60 b motion due to the entry of judgment. . . . Ordered Judge Leisure. cm.
		Magistrate Francis was assigned to the action on 7-10-90. Cliff Kirsch Dist Ex
7-25-90	—	Pretrial conf. held before magistrate FRANCIS.
8-3-90	—	Fld. letter to Judge leisure from Craig A Stewart dtd 6-25-90 re: request to deny the pltffs motion to alter or vacate judgment.
8-3-90	—	Fld. Letter To Judge Leisure from Stephen R Sugrue dtd 6-18-90 re: in response to the proposed final judgment submitted by the US.
8-3-90	—	Fld. letter to Judge Leisure from Stephen R Sugrue dtd 8-3-90 re: in response to the 6-25-90 letter of Mr Stewart regarding the sum of judgment.
11-13-90	—	Fld. defts post hearing memorandum referred to Magistrate Francis.
1-2-91	—	Fld. ORDER that by 1-18-91, the Gov't shall submit a brief of no m than 5 Pages addressing the pltff's contention that the gov't has submitted proper proof of assessment purs. to 26 USC 6203 & regula promulgated thereunder. By 1-25-91, the pltff may submit a reply bri of no more than 2 pages. SO ORDERED, MAG. FRANCIS. CMC MK
1/18/91	—	Fld. Deft's. SUPPLEMENTAL POST—HEARING MEMORANDUM. JR
1-30-91	—	Fld. supplemental post-Hearing Brief.

DATE	NR.	PROCEEDINGS
2-15-91	—	Fld. letter to magistrate Francis from Craig A Stewart dtd 7-17-90 re: notice of forwarding copies of the parties submissions to Judge leisure conce the proper amount of judgment. VB
2-15-91	—	Fld. transcript of inquest before Magistrate Francis.
2-19-91	—	Fld. report and recommendation of Magistrate Francis that the pltffs moti to modify the judgment be denied; Purs to Rule 72 FRCP parties have 10 days to written objectins to the report and recommendation. . . . ordered Magistrate Francis. cmc VB
3-7-91	—	Fld. pltffs. OBJECTION ot Mag. Report and Recommendation. gh
4-24-91	—	Fld Memo Order that Magistrate Francis' report and recommendation dtd 2-19- is adopted; pltff motion for relief from the judgment is denied. . . . Orders Judge leisure. cmc
6-20-91	—	Fld. PLTFF'S NOTICE OF APEPAL to the U.S. Court of Appeals for the 2nd Circuit from the Jgmt entered in this action on 6-14-90 & from Memo Order of this Court dtd. 4-23-91 which the Court denied pltf motion for relief from the jgmt. purs. to Rule 60(b). cm
6-25-91	—	Forwarded copy of Appeal to Dist. Judge & U.S.C.A. w/dkt entries
8/23/91	—	Fld Notice that the record on appeal has been certified & transmitted to the U for the 2nd Circuit on 8/23/91.
12/12/91	—	Fld. true copy of mandate and order w/ statement of costs that the judgment of the district court is affirmed. . . . Elaine goldsmith clerk cm. Copy to dist judg. VB

JON

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of November one thousand nine hundred and ninety-one.



PRESENT: HONORABLE J. EDWARD LUMBARD,
HONORABLE JON O. NEWMAN,
HONORABLE RALPH K. WINTER,
Circuit Judges.

[Filed Nov. 15, 1991]

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ARNOLD HOCHSTEIN,
Plaintiff-Appellant,

v. 91-6164

UNITED STATES OF AMERICA,
Defendant-Appellee.

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ORDER

Appeal from the United States District Court for the Southern District of New York (Peter K. Leisure, Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Arnold Hochstein appeals from the June 19, 1990, judgment dismissing his complaint against the United States and entering judgment in favor of the Government on its counterclaim for the principal amount of $26,156.51, interest in the amount of $19,162.78

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for the period up to June 15, 1990, and interest in accordance with law from the date of judgment. On appeal, Hochstein argues that the correct amount of interest owed as of June 15, 1990, was $5,421.00, plus the interest that accrued between May 3, 1989, and that date.

Hochstein's complaint challenged the Internal Revenue Service's (the "IRS") assessment against him for certain unpaid withholding taxes of Safelon Corporation. See 26 U.S.C. § 6672. Hochstein sought a declaration of non-liability and a refund of the amounts he had paid toward the assessment. The Government counterclaimed to collect the assessed amounts in full. The District Court entered judgment in favor of Hochstein following a bench trial. 713 F. Supp. 119 (S.D.N.Y. 1989). On appeal, this Court vacated and remanded with directions to the District Court to enter judgment in favor of the Government on its counterclaim. 900 F.2d 543 (2d Cir. 1990).

On remand, the District Court signed the Government's proposed judgment for $45,319.29. Hochstein thereafter sought to set aside the District Court's judgment, arguing that the trial evidence supported a judgment of only $31,577.51. Magistrate Judge James C. Francis IV held a hearing on the issue and issued a report and recommendation supporting the District Court's original judgment. The District Court adopted the Report in a memorandum order dated April 23, 1991. This appeal followed.

At the original trial, the Government introduced a certified record of Hochstein's civil penalty assessment. The document was dated May 3, 1989. When asked what the document showed about the status of Hochstein's assessment, Karen Ellen Andersson, an IRS Tax

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Examining Assistant, testified that the document showed that "[i]ts current status is a liability of $31,577.51." (emphasis added). The parties agree that the amount or principal owed by Hochstein is $26,171.51. Therefore, $5,421.00 of Hochstein's total assessed liability of $31,577.51, as reflected in the document, consisted of interest.

While the parties agree that interest began accruing on March 26, 1985, they disagree on whether the $5,421.00 represents interest accrued from that date until January 5, 1987, or until May 3, 1989. Hochstein argues that because the document was dated May 3, 1989, the document should be deemed as a matter of law to cover the time period up to the date of the document. Thus, Hochstein argues that he now owes $31,577.51, plus the interest that accrued after May 3, 1989. The Government argues that although the document was dated May 3, 1989, the document clearly indicates that the $5,421.00 figure represents the interest assessed as of January 5, 1987, not the interest accrued as of May 3, 1989.[1]

We agree. At the hearing before the Magistrate Judge, Andersson clarified any ambiguity in her trial testimony by explaining that the May 3 document reflected only the interest that had accrued as of January 5, 1987. Similarly, Irwin Marvald, an Advisor in the Special Procedures Function of the IRS, testified at the hearing that the document was certified on May 3 but the interest accrued through that date had not yet been assessed. The supporting documentation and calculations clearly indicate that $5,421.00 of interest accrued

[1]Interest accrues from the date that a tax becomes due until the date of payment. Assessed interest is the interest that is recorded as part of the assessment made on a particular day, although interest continues to accrue until payment is made.

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between March 26, 1985, and January 5, 1987, another $13,741.78 accrued between January 5, 1987, and June 15, 1990, thereby producing the total interest which the District Court awarded -- $19,162.78.

Hochstein's reliance on Brafman v. United States, 384 F.2d 863 (5th Cir. 1967), and Treasury Regulation § 301.6203-1 is misconceived. Brafman held that the Government failed to make a valid assessment because the appropriate IRS official did not sign the certificate of assessment as required by Treasury regulations. The Court noted that the Government may postpone the signing of a prepared certificate because of the limitations on collection and lien perfection that begin to run at the time of the assessment. 384 F.2d at 867. While such policy reasons may support a strict application of the Treasury regulation's signature requirement, no policy supports Hochstein's contention that the period in which interest accrues should be determined solely on the basis of the date on which the certificate of assessment is signed.

Hochstein also argues that the Government should not have received an opportunity to introduce evidence not introduced at trial. This argument is unavailing because the May 3 document, which was introduced at trial, indicated that the $5,421.00 figure represented interest accrued up to January 5, 1987. Furthermore, interest on a section 6672 penalty accrues by statute, and therefore the interest owed is a matter of law and does not have to be proved at trial. See United States v. Schroeder, 900 F.2d 1144, 1150 n.5 (7th Cir. 1990).

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Hochstein v. U.S.A.
Docket No. 91-6164

Circuit Judges.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

A TRUE COPY
ELAINE B. GOLDSMITH
BY: _____
Clerk

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 12/9/91.

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☆ U.S. GOVERNMENT PRINTING OFFICE: 1992 312-324 45432